

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Village of Tilton, Vermilion County, Illinois  
Petitioner

vs.

Norfolk and Southern Railroad and State of Illinois, Department of  
Transportation,  
Respondents

T00-0103

Petition for an Order regarding a separation of grades and  
construction of a bridge carrying 14<sup>th</sup> Street (FAU 7010), Village  
of Tilton, Vermilion County, Illinois, over the tracks of said  
Railway Company, apportioning cost thereof and directing an  
appropriate portion thereof to be borne by the Grade Crossing  
Protection Fund.

AMENDED ORDER

On January 4, 2001, the Illinois Commerce Commission ("Commission") held the first hearing in this matter before a duly authorized Administrative Law Judge at the Commission's Springfield office. Present and participating in the hearing were counsel for the Norfolk Southern Railway Company ("NS"), representatives of the Village of Tilton ("Village"), representatives of the Illinois Department of Transportation ("IDOT" or "Department"), and staff of the Commission's Rail Safety Section ("Staff"). Pursuant to a pre-hearing conference, it was discovered that CSX Transportation, Inc. ("CSX") would need to be a party to this Docket. The matter was continued in order for the Village to file an Amended Petition naming therein CSX Transportation, Inc. as a Respondent. The NS and CSX are also referred to as ("Railroads").

On May 1, 2001, an additional hearing was held at the Commission's Springfield office. Present and participating in the hearing was counsel for the Village, counsel for the NS, a representative of IDOT and the Staff. The Village Consulting Engineer provided information concerning certain aspects of the existing and proposed improvements. Plans were presented and the phases of the projects were reviewed, along with preliminary costs for the aforementioned improvements.

On December 5, 2001, the Commission entered its Interim Order that approved the 14<sup>th</sup> Street project in the Village, involving the reconstruction/realignment of 14<sup>th</sup> Street and the construction/reconstruction of highway overpass structures carrying 14<sup>th</sup> Street over the tracks of the NS and CSX as a safety improvement project and granted permission to the parties to proceed with the project under certain conditions. The Commission granted permission to the Village to proceed with the preliminary engineering, Phase 1 and 2, pertaining to the 14<sup>th</sup> Street project. The Village was required to submit the Phase 1 plans and cost estimate separated into (1) the cost for the NS highway overpass structure; (2) the cost for the CSX highway overpass

structure; and, (3) the cost for the immediate highway approaches to the highway overpass structures. Initial costs for the preliminary engineering phase of the 14<sup>th</sup> Street project were allocated to the Grade Crossing Protection Fund ("GCPF") in the amount of \$618,500 as contained in Finding (4) of the Interim Order. It was the intent of the Commission to issue further Order(s) in this matter increasing GCPF assistance to the maximum amount set forth in Finding (4) of the Interim Order, but only after a written request from the Village was received by the Director of Processing and Information, Transportation Division of the Commission.

The Commission received the required notification for additional GCPF assistance and a hearing on the construction phase of the project was scheduled at the Commission's Springfield office on February 21, 2002. Instead of taking testimony on the construction phases of the project, however, a new matter pertaining to mine subsidence in the area of the project was discussed. Testimony on the construction phase of the project was not presented at this hearing. From testimony provided by a mine subsidence expert, Dr. Marino, it was learned that a potentially costly and/or unsound situation from mine subsidence could possibly occur over and/or near the mined out areas under the project, which are primarily east of and west of the proposed NS structure. On May 8, 2002, the Commission entered its Supplemental Interim Order that granted permission for a study of mine subsidence in the area of the proposed construction. The cost for this study was estimated to be \$283,400. At a hearing on November 20, 2002, the Mine Subsidence Study, presented to the parties for their review, confirmed the potential for subsidence and estimated the costs of mine grouting remediation alternatives. The matter was continued until January 22, 2003, to give the parties time to review the subsidence study and recommendations.

Discussions between IDOT, the Village and Staff ensued regarding various options for dealing with future mine subsidence on the project. Dr. Marino indicated grouting the mined out area under the project was the most reliable method of preventing future subsidence, and estimated the additional cost to grout the mined out areas under the project to be approximately \$1,000,000. The Village was particularly concerned about any future maintenance costs or liabilities resulting from subsidence because of its relatively low revenue generating capabilities. IDOT was opposed to grouting under the project because of the added expense, the potential for higher than anticipated grouting costs, its relatively successful record to date of building structures over mined out areas, and its desire not to set a precedent for grouting mined out areas under structures. The use of lightweight cellular concrete fill versus normal earthen embankment materials in order to minimize the weight of the embankment was investigated. This alternative would reduce the probability of future subsidence, but would likely add approximately \$500,000 to the project cost if used. IDOT was of the opinion that the structure should be constructed to accommodate future subsidence movements as much as possible with a minimum of damage, and that the damage resulting should be repairable to the maximum extent possible. IDOT further directed the use of extensible geotextile (non-metallic) soil reinforcement whenever possible over the mined out areas, coupled with some form of two-stage Mechanically Stabilized Earth (MSE) wall. The MSE wall involves an inner geotextile and/or wire wall that will move with subsidence, yet still contain the embankment fill, should the outer concrete panel wall need to be removed for repairs. The MSE wall to be constructed involves the

above referenced concept east of the NS structure, where it can be reasonably executed, coupled with the use of limited size rectangular panels throughout to permit the most movement without damage, and with future adjustability to be built in to the two-stage walls to maximize re-use of face panels should they require future adjustments. Further, the top layer of the embankment under the pavement is composed of an open graded material which can be pumped with grout using slab jacking techniques in the future to help straighten out subsidence areas should they develop under the pavement. The additional cost for the two-stage MSE wall construction, where used, was estimated to be \$250,000.

On October 8, 2003, and October 29, 2003, hearings were again held at the Commission's Springfield office. At the October 8, 2003, hearing, Counsel for the NS, CSX, and Village entered appearances for their clients. Representatives of IDOT and Staff were present and participated in the hearing, as well. At the October 29, 2003, hearing, the same parties were present, except Counsel now represented IDOT. At the October 29, 2003, hearing, the parties stated that a cost division had been agreed to. But, through a pre-hearing conference, it was learned that the cost division was approximately \$150,000 under funded. The parties asked for a continuance to continue discussion on the cost division and the matter was set for a December 10, 2003, hearing.

The project will be constructed on the existing alignment or a new alignment as agreed to by each Agency. The 14<sup>th</sup> Street Improvement Project begins at Sta. 265+00 and ends at Sta. 301+00. The GCPF eligible portion of the project consists of the improvements along 14<sup>th</sup> Street from Sta. 265+00 to Sta. 288+00, including all side road connections and appurtenances and is generally described as follows:

- The typical pavement section over the CSX track consists of a 3-lane (13'-12'-13') concrete pavement with a concrete sidewalk (10') along one side of the roadway.
- The span of the 3-sided pre-cast concrete bridge over the CSX track is 42'-0".
- The typical pavement section over the NS track varies from a 3-lane (13'-12'-13') to a 2-lane (13'-13') concrete pavement with a concrete sidewalk (10') along one side of the roadway.
- The span of the reinforced concrete deck bridge constructed over the NS track is 97'-4 7/8" in length. In general, the typical pavement section from Sta. 285+00 to 301+00 is a 3-lane (11'-12'-11') concrete pavement with a concrete sidewalk (5') on both sides of the roadway.
- In order to undertake and complete the proposed construction, easements must be obtained from CSX and NS.

On May 3, 2004, the NS sent correspondence to Daniel Schuering, Counsel for the Village, outlining the railroad's understanding of its cost for the project. NS stated that its total cash contribution toward the project should not exceed \$380,000, which will be paid in a lump sum upon completion and final acceptance of the project. Secondly, NS wants its force account work (estimated to be \$144,250), to accommodate the construction of the proposed bridge and roadway work, to be 100% reimbursable at project expense and be separate and distinct from its lump sum contribution. Railroad

flagging costs are already included in the calculation of the construction cost for this project, and will also be 100% reimbursable at project expense.

On May 14, 2004, Staff forwarded a proposed cost division for the project to all the parties for their review and response. On May 27, 2004, May 28, 2004, and June 3, 2004, responses were received from the CSX and IDOT, respectively. James Cook, Counsel for CSX, stated in his Response to Staff's proposed cost division that the correct CSX force account amount should be \$75,427. A revised estimate was attached to the CSX Response. In addition, CSX offered the same conditions on lump sum payments and flagging costs as outlined for NS in the proceeding paragraph.

In a letter dated May 20, 2004, Mr. Daniel Schuering, Counsel for the Village, advised that costs for railroad flagging will be paid by the bidding contractor in an effort by the Village to control the contractor's costs, to wit: *"the contractual specifications and project documents clearly provide that this cost is a responsibility of the contractor for which the project will not provide, to the contractor, additional compensation in the event additional days of railroad flagmen are necessary. Railroad flagging costs have been otherwise included as a cost to be paid by the bidding contractor and have been included as a construction cost line item."* The Village continued: *"In the event additional days of flagging are necessary, or in the event that flagging costs are incurred in excess of those identified in the force account estimate of CSX, the Village of Tilton has assured CSX that the bidding contractor will reimburse CSX the aforementioned additional cost as billed by CSX. The Village has represented that by inclusion of flagging cost as a construction cost line item, it has not intended to eliminate any necessary railroad flagging operations or to reduce CSX's reimbursement for those flagging costs"*. The Village further recommended that any Commission Order in this matter include a clarification that CSX will be reimbursed by the bidding contractor for its flagging cost as billed, even if in excess of the construction cost line item. The same provisions apply to the NS.

IDOT'S Response to Staff's Proposed Cost Division, filed by Stacey Hollo, Counsel representing IDOT, indicated that IDOT had no objection to the proposed cost division provided that the GCPF and the Railroads' amounts are regarded as lump sum amounts to be paid regardless of the actual project costs. In support of its position, IDOT noted that the GCPF and Railroad's figures are below the customary percentages expected in this type of project and IDOT has been assessed a majority of the project costs. Accordingly, IDOT submitted that if the project comes in under the estimated cost any savings should be applied to IDOT's portion and not to the GCPF or Railroad costs until a 60% and 5%, respectively, allocation of costs is met. Staff disagreed. This project was necessitated by IDOT's project on Ill. Rte 1 and Staff advocates that if the cost of the project is less than the estimated cost, all the parties should participate in the savings or overruns per the percentages as listed in "Revised Appendix A", attached hereto.

On June 3, 2004, CSX filed a response to IDOT's response to Staff's Proposed Cost Division reiterating it's previous position and requests.

On June 29, 2004, the Commission entered its Second Supplemental Interim Order that required the Village to proceed with the construction phase of the project and allocated the remaining \$4,016,600 from the GCPF, which is minus the payments already obligated from the GCPF for preliminary engineering and the mine subsidence study obligated by previous Interim Orders.

On August 13, 2004, the Commission received the Department's MOTION TO STRIKE. At the hearing on October 27, 2004, the Administrative Law Judge denied the Department's MOTION TO STRIKE.

Counsel for NS stated that the railroad's bridge department had reviewed the revised plans, had held discussions with the Village's Engineer, and had no objection to the construction of the highway overpass structure carrying 14<sup>th</sup> Street over the NS track and to the associated roadway work.

On October 27, 2004, what was termed the final hearing was held at the Commission's Springfield office. A representative of the Commission's Rail Safety Section made an appearance at the hearing. He testified that all required estimates and other documents had been received. Village Exhibits No. 13, 14 and 15 were admitted into evidence at the hearing. Village Exhibit No. 13 was an Engineer's Affidavit stating that, in his judgment as an Illinois Certified Structural Engineer, the solution provided involving two-stage mechanically stabilized earth retaining walls over the primary subsidence prone area east of the NS is an appropriate solution for the subsidence situation. The mitigation measures taken were judged to reduce the damage and make the damage more repairable should a subsidence event affect the structure(s), but will not remove the potential for damage or hazards resulting from a subsidence event. This was predicated also on the basis that the costs to install such a solution are not prohibitive, that periodic observations and inspections of the structure for distress are performed, and a commitment by IDOT to assist the Village in obtaining funding for any required future subsidence related repairs. IDOT agreed to assist the Village in obtaining emergency funding from the General Assembly in the case of the subsidence event. Exhibit No. 14 was a letter from IDOT's District 5 Engineer of Local Roads and Streets, stating that the "Department" approves the use of a "two stage" mechanically stabilized earth wall over the mined areas for the NS bridge structure project. Village Petitioner's Exhibit No. 15 was a set of revised plans for the NS structure. Staff was of the opinion that all the pertinent parties have approved the revised plans. At the hearing on October 27, 2004, the matter was marked "Heard and Taken."

On February 24, 2005, the Commission issued an Order authorizing the Village of Tilton to proceed with the construction phase of the 14th Street Project, substantially in the manner and location as set forth in Village Exhibit No. 15.

On April 10, 2006, the Village filed its Supplemental Petition stating, in part, that bids were opened for completing the work on the project on Thursday, May 26, 2005. The lone bidder on the project was O'Neil Brothers Construction of Tilton, Illinois. Its bid was in excess of \$10,400,000, approximately \$2,000,000 over the estimated construction costs of \$8,240,620. The funding package was not sufficient to cover completion of the project utilizing the bid received for the project. After consultation with

Staff and the other parties, including IDOT, the Village re-bid the project utilizing a "combination bid" as authorized by Section 12-1.02(b) of the Illinois Department of Transportation Bureau of local Roads and Streets Manual in the Project Divisions.

Prior to re-bidding the project, the Village received IDOT's approval of revised plans on October 11, 2005. As part of the re-bid process, the project was typically advertised by the project engineers and plans for the project were widely distributed, with 9 sets of plans being distributed to general contractors capable of constructing the project. On November 10, 2005, again only a single bid was received for the project from the same bidder, O'Neil Brothers Construction. The lowest combination of bids was \$10,414,693.48. The bid was within 7.05% of the Engineer's Estimate approved by IDOT. The bid, as submitted, is an awardable bid provided that an Amended Order is entered by the Commission revising the division of cost, providing for further assistance from the GCPF, the Village and the Department.

On May 31, 2006, another hearing was held in this matter at the Commission's Springfield office. Present at the hearing were Counsel for the Village, NS, CSX and the Department. A representative of the Commission Rail Safety Section was also present and participated in the hearing. Counsel for the NS, CSX, the Village and the Department made arguments in regard to pending Motions to Dismiss filed by the NS and CSX. The parties requested that a ruling on the Motions be stayed temporarily to afford an opportunity to negotiate a resolution to the contested issues in this case. The Railroads objected to an increase in their participation in the funding package for the project. The Department and Commission staff also expressed concerns regarding the increased costs for the non-GCPF eligible portions of the project.

On August 25, 2006, Staff submitted an Amended Cost Division to all parties. Staff's Amended Cost Division includes an increase in the Department's portion of the cost to \$6,193,042. Staff's Amended Cost Division also recommends that the Village be responsible for any remaining project costs above \$14,160,000. The Railroads' contributions remain as lump sum payments and have not increased. The Village's portion has increased from a lump sum payment of \$89,020 to \$647,500. Staff's Amended Cost Division also includes an increase in GCPF assistance to a new total of \$6,814,758, which includes previous allocations for \$4,918,500 for preliminary engineering, the subsidence study, and the construction phase of the project, as well as \$521,200 in additional assistance for Preliminary Engineering and \$1,375,058 for other eligible project costs. A recommended division of cost as prepared by Staff is attached hereto and incorporated herein as "Amended Appendix A".

Pursuant to due notice given in accordance with the law and the rules and regulations of the Commission, the matter came on for further hearing before a duly authorized Administrative Law Judge of the Commission on September 7, 2006, at the Commission's Springfield office. Present at the hearing were Counsel for the Village, NS, CSX, and the Department, as well as Staff. Staff offered a motion to amend the existing Order, based on new project plans provided by the Village and an agreement by all parties on a cost division for the project. The Village submitted copies of revised project plans entered as Petitioner's Exhibit 16, which do not include any substantial changes from the plans previously approved by the Commission. Testimony was

presented regarding changes to the highway approach work within the GCPF-eligible project limits. The revisions were made necessary by the reduction in the scope of the road work to improve 14<sup>th</sup> Street in the Non-GCPF eligible portion of the project as originally designed. The work required within the GCPF-eligible project limits, in addition to the increasing construction costs since the project was originally proposed, have contributed to the Village's need for additional funding. The Village Engineer additionally testified that the increased contribution of the Village will be used to offset costs of water and sewer force main relocation, environmental and special matter remediation and construction of the detour route. The Village filed an Amended Exhibit C which incorporates all of the changes to the scope of the work and the cost thereof. No objections were made to the revised Exhibit C or revised Exhibit 16 and the Exhibits were admitted into evidence. The Department introduced into evidence a Project Agreement executed between the Village and the Department on August 13, 2004 and a proposed Supplemental Project Agreement agreed to in principle by the parties which will be executed upon issuance of the Commission's Amended Order as Department's Exhibits 1 and 2, without objection. Staff submitted an Amended Order previously agreed to in principle by all parties, and all parties waived the Proposed Order process. All previous motions, including the Village's Supplemental Petition and Motions to Dismiss submitted by NS and CSX, were denied without prejudice. On September 7, 2006, the matter was marked "Heard and Taken."

The Commission, having given due consideration to the entire record herein, finds that:

- 1) The Commission has jurisdiction of the parties hereto and the subject matter hereof;
- 2) The recitals of fact as set forth in the prefatory portion of this Order are true and correct and are hereby adopted as findings of fact;
- 3) The Village of Tilton should be required to proceed with the construction of the 14<sup>th</sup> Street highway overpass structure over the track of the NS and the reconstruction of the existing highway overpass structure carrying 14<sup>th</sup> Street over the track of CSX and other associated work, substantially as shown on Village's Exhibit No. 16;
- 4) In the event of a mine subsidence event that damages the structure over NS and CSX tracks, the Department has agreed to assist the Village in obtaining emergency funding from the General Assembly for repairs;
- 5) The cost for the proposed improvements should be divided among the parties and the Grade Crossing Protection Fund of the Motor Fuel Tax Law, in accordance with the Law;
- 6) It is fair and reasonable that the Secretary of the Illinois Department of Transportation, through the Grade Crossing Protection Fund of the Motor Fuel Tax Law and other funding sources, the Village of Tilton, the Norfolk Southern Railway Company, and CSX Transportation, Inc, be directed to bear their respective

portions of the actual cost of the proposed improvements as set forth in the table attached as Amended Appendix A to this Order; The amount to be paid by NS and CSX shall not exceed \$380,000 and \$124,677 respectively. (Note: the NS payment of \$380,000 and the CSX payment of \$124,700 will be lump sum payments upon completion and final acceptance of the project); NS and CSX force account work, estimated to be \$144,250 and \$75,427, respectively, is 100% reimbursable at project expense and is separate and distinct from each railroad's lump sum payments; Grade Crossing Protection Fund assistance is increased to a new total of \$6,814,758, which includes previous allocations for \$4,918,500 for preliminary engineering, the subsidence study, and the construction phase of the project, as well as \$521,200 in additional assistance for Preliminary Engineering and \$1,375,058 for other eligible project costs; the Department will pay a total amount not to exceed \$6,193,042; the Village will pay all remaining costs;

- 7) The Village accepts responsibility for all project costs above \$14,160,000, based upon an agreement between the Department and the Village; all future maintenance costs of both highway overpass structures, highway approaches thereto, and associated roadway improvements, shall be paid 100% by the Village (see Finding 4 for procedure in the event of a subsidence event); in the event the final cost for the required work is less than estimated, any savings should be credited to the Village; no further assistance from the Grade Crossing Protection Fund shall be made available for the subject project;
- 8) 625 ILCS 5/18c-1701 and 1704 require each "person", as defined by Section 18c-1104, to comply with every regulation or order of the Commission. These sections further provide that any person who fails to comply with a Commission regulation or Order shall forfeit to the state not more than \$1,000 for each such failure, with each day's continuance of the violation being considered a separate offense. While the Commission expects all parties to comply with this Order in all matters addressed herein and in a timely manner, the Commission advises that any failure to comply may result in the assessment of such sanctions.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that permission is hereby granted to the Village of Tilton to proceed with the construction phase of the 14<sup>th</sup> Street Project, substantially in the manner and location as set forth in Village Exhibit No. 16.

IT IS FURTHER ORDERED that the Village of Tilton be, and it is hereby, required and directed to proceed immediately in performing its work substantially as described in the prefatory portion of this Order and to Village Exhibit No. 16 and shall complete its work within thirty-six (36) months from the date of this Order.

IT IS FURTHER ORDERED that the Illinois Department of Transportation has agreed to assist the Village of Tilton to obtain emergency funding from the General Assembly in the event of a subsidence event that causes damage to the new structure due to limited funds available to the Village.

IT IS FURTHER ORDERED that the cost of making the improvements herein required shall be divided among the parties and the Grade Crossing Protection Fund of the Motor Fuel Tax Law, as set forth in Findings (6) and (7) herein and Appendix A, attached hereto. The bidding contractor will reimburse CSX and NS for its flagging costs as billed, even if in excess of the estimated cost. No further assistance from the Grade Crossing Protection Fund shall be made available for the subject project.


IT IS FURTHER ORDERED that since federal funding may be utilized for the grade separation and roadway improvements at the subject crossings, all such work shall be covered by appropriate provisions of Title 23, Chapter I, Subchapter G, Part 646 of the Federal-Aid Policy Guide adopted Dec. 9, 1991.

IT IS FURTHER ORDERED that all bills for expenditures authorized to be reimbursed from the Grade Crossing Protection Fund shall be submitted to the Fiscal Control Unit of the Illinois Department of Transportation's District 5 Bureau of Local Roads and Streets, 13473 IL Hwy. 133, P.O. Box 610, Paris, Illinois, 61944. The Department shall submit a copy of all bills to the Director of Processing and Information, Transportation Bureau of the Commission. The final bill for expenditures from the Village of Tilton and/or the Railroads shall be clearly marked "Final Bill". The Department shall not obligate any assistance from the Grade Crossing Protection Fund for the cost of proposed improvements set forth in the prefatory portion of this Order without prior approval by the Commission. The Commission shall, at the end of the 12<sup>th</sup> month from the completion date specified in this or any Supplemental Order, notify the Department to de-obligate all residual Grade Crossing Protection Fund assistance accountable for this project.

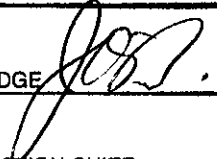
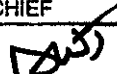
IT IS FURTHER ORDERED that all other terms and conditions of the original Order, dated February 24, 2005, are hereby affirmed and shall remain in full force and effect except as herein modified.

IT IS FURTHER ORDERED that subject to Sections 18c-2201 and 18c-2206 of the Law, this is a final decision of the Commission subject to Administrative Review Law.

By Order of the Commission this 26<sup>th</sup> day of September 2006.



Chairman

JUDGE	
SECTION CHIEF	
ORDERS SUPERVISOR	

AMENDED APPENDIX A  
COST DIVISION  
14TH STREET IMPROVEMENTS  
Tilton, IL  
(T00-0103)

Item	Recommended Division of Cost							COST SUMMARY		
	GCPF	Railroad Funds		Local/State Funds			Total Cost	GCPF Eligible Cost	Non GCPF Eligible Cost	Total Cost
		CSX	NS	Tilton Local Funds	IDOT TARP Funds	Construction Funds (Ramp Credits)				
Construction Preliminary Engineering(PH I)	4,401,758	49,250	235,700	599,100	114,600	676,000	4,029,642	9,275,700	830,300	10,106,000
Preliminary Engineering (PH II)	779,100						137,500	779,100	137,500	916,600
Construction Engineering (PH III)	843,100						148,800	843,100	148,800	991,900
ROW & Land Acquisition	764,400			17,400			568,100	1,264,900	85,000	1,349,900
Railroad Force Account	26,400	75,500	144,300	31,000			501,000	532,000		532,000
Est.Total Project Cost	\$6,814,758***	\$124,700*	\$380,000*	\$647,500	\$114,600	\$676,000	\$5,402,442	\$12,958,400	\$1,201,600	\$14,160,000**
% Participation ICC Eligible Cost	52.59%	0.96%	2.93%							
% Participation Total Project Cost	48.13%	0.88%	2.68%	4.58%	0.81%	4.77%	38.15%			

\* Lump Sum Payment.

\*\* The Village of Tilton to pay all Project Costs in excess of the Total Project Cost of \$14,160,000.

\*\*\* Staff recommends that no further assistance from the GCPF be made available for the subject project.